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Ed Smith
CLERK OF THE SUPREME COURT
STATE OF MONTANA

IN THE SUPREME COURT OF THE
STATE OF MONTANA

Supreme Court Cause No. DA 10-0055

FILED

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CLERK OF THE SUPREME COURT
STATE OF MONTANA

APPELLANT'S BRIEF

Appeal from Case # CDV-09-093,
Petition for Postconviction Relief,
Scott P. Heddings, Petitioner,
State of Montana, Respondent,
Cascade County District Court,
Judge Kenneth Neill

Appellant:

Scott P. Heddings, 09156-046, pro se
FCI Englewood
9595 W. Quincy Ave.
Littleton, CO 80123

v.

Appellee:

State of Montana,
Montana Attorney General
P.O. Box 201401
Helena, MT 59620

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INCLUDED EXHIBITS

Exhibit 1 - Federal Presentence Investigation Report	
Exhibit 2 - Federal Sentencing Transcripts	
Exhibit 3 - Federal Sentencing Table	
Exhibit 4 - Federal Judgement & Commitment Order	
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ISSUES FOR REVIEW

The Issues presented by the Appellant for review by the Court are:

1. 5th Amendment Double Jeopardy violation by receiving multiple punishments for the same conduct.
2. State court conviction obtained in violation of Montana statute MCA 46-11-504.
3. Ineffective assistance of counsel.

STATEMENT OF THE CASE

This appeal is being brought for this Courts review of the denial of the Appellant's Petition for Postconviction Relief filing in the Cascade County District Court (case CDV-09-093), which was seeking relief for the above stated issues. The court below denied all grounds for which relief was sought.

STATEMENT OF THE FACTS

The Appellant was first arrested and charged in Cascade County, Montana with one count of incest¹. During questioning, the Appellant made incriminating statements regarding child pornography, which led to his indictment and conviction for Possession & Receipt of Child Pornography, and Destruction or Removal of Property to Prevent Seizure²(Exh. 4). During the federal sentencing proceedings the court applied additional punishment (5 levels) specifically due to the Appellant's pending charges and allegations in the Montana and Missouri cases. (See Exh. 2, pgs. 10-12). The additional punishment received was approximately 9 years. (Raised from level 32(121-151 months) to level 37(210-262 months))(See Exh. 3 - Federal Sentencing Table).

¹ Case No. CDC-05-489

² 18 U.S.C.S. §§ 2252A(a)(2); (a)(5)(B); § 2232(a)

After the federal sentencing hearing on September 6, 2007 the Appellant was brought to the Cascade County District Court for Change of Plea and Sentencing, pursuant to a plea agreement. The Appellant, over previous objections made to counsel, was then sentenced to 20 years with 16 years suspended, to run concurrently with the previously imposed federal sentence. The sentence in State court was for the same conduct that the Appellant was punished for in federal court.

The Appellant's objections and requests to counsel for dismissal of the State charges are found in the record of the Petition for Postconviction Relief.

STANDARD OF REVIEW

The Appellant asks this Court to review this Appeal with the standards and procedures set forth and established by the Montana Legislature and thru the Rules set by this Court.

The Appellant does not have access to the Statutes and Montana case law and asks the Court to construe this Appeal liberally, as the Appellant is a layman at law and can not afford the luxury of an attorney. This liberal construent would follow the U.S. Supreme Court case law of Haines v. Kerner, 30 L.Ed.2d 652, "We can not say with assurance that under the allegations of the pro se complaint, which we hold to less stringent standards than formal pleadings drafted by lawyers...".

The Appellant believes this Court has jurisdiction over this matter per the Montana Rules of Appellate Procedure, Rule 14.

SUMMARY OF ARGUMENTS

A. Summary of Arguments

This Appeal is from the decision of the District Court of Cascade County, Montana of the Appellant's Petition for Post-conviction Relief which raised the issues and claims as described herein.

The Appellant brings forth to the Court claims that his Constitutional rights have been violated by the conviction and multiplicitous punishment received by the State of Montana; that the bar of the 5th Amendment's double-jeopardy clause has been violated. As well, it is the Appellant's claim that Montana statute MCA 46-11-504 has been violated by his receiving punishment from Montana for the same conduct that the federal government punished him for previously. This Court has recently clarified this statute in State v. Neufeld, 351 Mont. 389 (2009) by stating that punishment received in another jurisdiction by means of a sentence enhancement also provides for the second prosecution restriction and protection from multiple punishments (double-jeopardy).

Finally, the Appellant claims that his appointed counsel in the criminal case was ineffective in his representation, in accordance with the standards and precedent accepted in Strickland v. Washington, 466 U.S. 668 (1984).

It is the Appellant's position that the District Court judge is incorrect in his determination of applicability of the Montana Statute, the U.S. Constitution's 5th Amendment and this Court's decision and opinion in Neufeld.

The Appellant feels that the District Court judge is incorrect in it's application of State v. Anderson, 291 Mont. 242 and Witte v. U.S., 515 U.S. 389 in order to makes it's decision denying relief of the Postconviction Relief Petition.

It is the Appellant's position that Neufeld has set a new precedent over the Anderson case and has now made it the standard for which Appellant's case should be reviewed.

There are very apparent similarities between the Appellant's and the Neufeld case in regards to enhanced federal sentences and future punishment for the same related conduct of the State case.

B. Arguments

1. Double Jeopardy

The Double Jeopardy clause of the 5th Ammendment of the U.S. Constitution protects a person from the possibility of receiving multiple punishments for the same offense after conviction.

This foundational Constitutional principle and right has long been established and clarified by the United States Supreme Court over the years to cover offenses and conduct that has already been punished in one jurisdiction, including between the federal government and the States. (Ref. Moore v. People, 14 How. 13; Ex Parte Lange, 21 L.Ed 872; North Carolina v. Pearce, 23 L.Ed.2d 656; U.S. v. Halper, 104 L.Ed.2d 487)

The double jeopardy protections of the 5th Amendment is made applicable to the States thru the 14th Amendment. As well, the Montana Constitution has this protection in Article II, Section 25.

The Montana Legislature has given the people further protection from double jeopardy in it's creation of statute 46-11-504,

which resolves to prevent a person from being prosecuted and punished for conduct that has already been taken into account in any other jurisdiction.

The District Court in it's ruling denying postconviction relief indicates that it feels that State v. Anderson and Witte v. U.S. are controlling and have rejected the arguments of enhanced sentences being a bar to future punishment for the same conduct.

The Appellant argues that the District Court is wrong and that there are differences in each of those cases that would make them NOT applicable in the Appellant's case.

In each of the cited cases by the District Court the defendant's were being prosecuted in the same jurisdictions, whereas the Appellant's cases are cross-jurisdictional.

In Witte, the defendant was sentenced within the statutory range allowed by law, as was the Appellant in his federal case. However, Witte was subsequently prosecuted and sentenced on a new charge in federal court where that same conduct had already been considered for as increased punishment in the first case.

Also, in Witte, the court concluded that though the majority did not find a double jeopardy violation, they did point out that the U.S. Sentencing Guidelines provided for the necessary protections to prevent unwarranted double punishment. (See Witte, pg. 14, Id. 5).

The Witte court also points out in it's analysis that,

"At its core, much of the petitioner's argument addresses not a claim that the instant prosecution violates principles of double jeopardy, but the more modest contention that he should not receive a second sentence under the Guidelines for the cocaine activities that were considered as relevant conduct for the marijuana sentence."

Therefore, Witte should not be construed as controlling in the Appellant's case, as the Appellant mainly claims a 5th Amendment double jeopardy violation has occurred, with no other protection from multiple punishment, as there is in a strictly federal prosecution.

The only way in the instant case to prevent double punishment, since there are two jurisdictions involved, is to recognize the 5th Amendment clause as controlling and to use the rationale used in the Neufeld decision, which affords protection from multiple punishments thru MCA 46-11-504, which is described in that case as a double jeopardy protection.

The Anderson case is similar to the Witte case, but was on the State level only.

In each of those cases (Anderson and Witte) there is strong dissenting opinion published that argue in favor of the defendant, in that it is a fact according to Constitutional protections, that prior considered conduct in a sentence is punishment and can not be considered in a later prosecution or sentence.

On the State level, this Court has recently clarified and superseded Anderson in its opinion of Neufeld. Anderson should not be controlling here, as the concept of enhancements as additional punishment prohibiting further future prosecution and punishment is controlled by the Neufeld decision.

It is clear thru the record that the Appellant has been punished in federal court for conduct which the State sought to and has punished him for again, in violation of the double jeopardy clause of the U.S. 5th Amendment, Montana's Constitution, and as clarified by this Court in Neufeld.

2. Montana Statute 46-11-504 violation

According to Neufeld and 46-11-504, the Appellant's State court conviction & prosecution was a violation of his rights. This Court has decided in Neufeld that even though the charges are not identical in nature, the fact that the conduct was punished in Federal court was a bar to the State from pursuing prosecution as well, that doing so was in violation of 46-11-504 as well as double jeopardy.

Although I was not charged with the identical offenses in federal court as I was in State court, Montana sought to, and has punished me for the same conduct I have already been punished for in Federal court, against the precedent set by this Court. (See Neufeld at ¶17).

Both the State case and the Federal case used the same exact discovery, confession, and statements from the State case victims, to apply the enhancement for punishment.

In Neufeld, he was charged in State court with a physical crime, Sexual Intercourse Without Consent, and in the federal court with Sexual Exploitation of a Minor and Possession of Child Pornography. This Court cited State v. Cech, 338 Mont. 330, ¶18 stating that "It is not necessary that a defendant be charged with identical offenses in both jurisdictions, only that his conduct constitute an equivalent offense in both jurisdictions." (See Neufeld ¶14).

In Appellant's case, though he was not charged with identical offenses in the State and Federal cases, his conduct did constitute an equivalent offense of federal law, that being 18 U.S.C. 2243, Sexual Abuse of a minor or ward. However, the federal government

did not charge Appellant with that conduct, but instead chose to enhance his sentence based upon that conduct.

In Neufeld, the Court clarified that the federal offense did not "necessarily include" sexual intercourse (§23). This is true in Appellant's case as well, as the charged federal offense was for Receipt and Possession of Child Pornography, unlike the State offense of Incest, the physical crime.

Also in Neufeld, at §24, the Court clarified its position as to the applicability of 46-11-504 when the federal charging documents do not contain the same prohibited conduct as that of the State's, in that it is the fact that the person has been punished already for that prohibited conduct, because the "federal sentence incorporated the same prohibited conduct."

During the State sentencing hearing on October 23, 2007³ before Judge Kenneth Neill, my attorney made it known to the court that I had recently been convicted in federal court on separate charges that came about during the interview with detectives in the State case. My attorney also explained that the federal sentence was enhanced 5-levels based on the State court action, resulting in an additional 9 years punishment. It was specifically stated to the judge that I was already being punished by the federal government for the same conduct that the State was prosecuting me with. (See State court Sentencing transcripts, pgs. 18-20).

The judge in the State court action failed to recognize the double jeopardy implications of the 5th Amendment and the prohibition that 46-11-504 restricts concerning subsequent prosecutions.

³ See CDC-05-489, Sentencing Transcripts, Exhibit 5.

The District Court judge in it's Order denying relief does however conclude that there is language in Neufeld that is applicable to the instant case. "While there is language in the concurrence that supports Heddings' position, the principle articulated by the concurrence is not reflected in the majority opinion, and is therefore not controlling." (See P.C.R. Order, page 5). However, the Appellant believes that the concurring opinion of Justice Rice is clarifying and in part only repeating in different words what was already determined and is part of the majority opinion.

The key point that is made is what caused the double jeopardy protections was the admitted sexual activity by the defendant that led to the enhancement of the federal sentence. "Thus, it was the enhancement of Neufeld's(Heddings) sentence which triggered the double jeopardy protections under §46-11-504, MCA, because at that point he was being punished for the same prohibited conduct for which he was charged in State Court. Therefore, though the federal and Montana offenses where different as originally charged, Neufeld's federal sentence incorporated the same prohibited conduct." (Neufeld ¶ 24).

3. Ineffective Assistance of Counsel

In the District Court's order denying Postconviction Relief, the Court points to Strickland v. Washington, 466 U.S. 668, as being the standard by which ineffective assistance of counsel claims are measured.

The judge goes on to state that the Appellant's counsel was not defiecient; and that he was not prejudiced by counsels failure to move to dismiss on double jeopardy grounds.

The Appellant claims that the brief justification for denial that the judge has given falls short of a proper examination of the facts and potential outcomes of the case.

It is undisputed from the record that the Appellant requested numerous times from his appointed counsel to move for a dismissal of the State charges based on double jeopardy. (See claims in Appellant's Postconviction Relief application, which should be part of this record, as requested from the Clerk of the District Court.) The record also shows that counsel likely believed that the Appellant was about to be punished twice for the same conduct, based upon counsels statements to the court regarding the conduct that was previously considered by the federal court. (See State Court sentencing transcripts, pgs. 18-20).

Under the Strickland test, it would not have been an unreasonable request to move to dismiss, and would have been within the prevailing professional norms to do so. The Appellant(Defendant) was certainly prejudiced by counsels failures to make an attempt to have the State charges dismissed.

Because the District Court can today say that Appellant's claims of double jeopardy have no merit and that it would have been frivolous to have had counsel argue the matter(See Order Page 7), it is not the standard that Strickland lays out.

The District Court points out itself on Page 6 of the Order that the second prong of Strickland requires the "...defendant demonstrate that his counsel's deficient performance prejudiced him such that there is a "reasonable probability" that the result of the proceeding would have been different...". The "reasonable probability" standard "...does not require that a defendant show

that he would have been acquitted." (Page 6 of Order). This indicates that the Appellant would not be required to show that his motion to dismiss would have been granted if it were filed, but that he is prejudiced for that fact that counsel failed to file it and argue the merits of it to the court.

There is no way for the court to determine with any amount of certainty what it might have done or ruled on based on unknown arguments or presentations by counsel had he moved to dismiss.

The Appellant's rights were violated by not having that opportunity to present those argument and facts to the lower court.

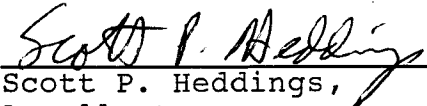
Therefore, the Appellant(Defendant) was prejudiced by counsels failure to move to dismiss, and his performance on that ground was below an objective standard of reasonableness set by Strickland, thereby denying Appellant effective assistance of counsel. There was sufficient evidence that counsel could have presented to the court to prove that he was being punished twice by the State. (See Exhibit 1, Federal PSR, and Addendum to PSR, Exhibit 2 - Federal Sentencing Transcripts, pages 10-12, Exhibit 3, Federal Sentencing Table, Exhibit 4, Federal J&C Order).

CONCLUSION

It is thru this appeal to the Court that the Appellant prays that the Order denying relief in the Postconviction Relief Petition would be reversed and that the Montana conviction be ordered overturned and dismissed on double jeopardy violation grounds. The Appellant further prays that this Court would grant relief from the claimed ineffective assistance of counsel, and any other relief that this Court deems appropriate and available.

The Appellant would further request that the Court would invite former Montana Supreme Court Justice J. Hunt, Sr. to file an amicus curiae brief in this matter. The Appellant has been unable to find contact information for Justice Hunt, but believes his input in this case would be valuable and lend additional legal insight in these inclosed topics.

Respectfully submitted this 2nd day of April, 2010.



Scott P. Heddings,
Appellant, pro se


CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing Appellant's Brief has been served upon the following:

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Dated this 2nd day of April, 2010.



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CERTIFICATE OF COMPLIANCE

This brief has been prepared using monospaced typeface,
a 10 CPI font, and is within the 10,000 word count limit, and
is 13 pages in length.

Certified and dated this 2nd day of April, 2010.

Scott P. Heddings
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